

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Regulated Industries Committee

BILL: CS/SB 2358

INTRODUCER: Regulated Industries Committee and Senator Gardiner

SUBJECT: Timeshares/Foreclosure

DATE: March 24, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.			JU	
3.			BI	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill provides a nonjudicial process for the foreclosure of liens on timeshare interests, which the bill refers to as a trustee foreclosure process. The bill creates separate but similar trustee procedures for the foreclosure of liens based on unpaid assessments and for mortgage liens. Each procedure gives the timeshare interest owner (obligor) an opportunity to object to the nonjudicial foreclosure process and to contest the foreclosure through a judicial process. If the owner does not object to the use of the trustee foreclosure procedure, he or she will not be subject to a deficiency judgment even if the proceeds from the sale of the timeshare interest are insufficient to offset the amounts secured by the lien.

The trustee foreclosure for assessment liens applies to any default that gives rise to an assessment lien after the effective date of the bill. However, a timeshare instrument does not need to be amended to permit the managing entity of a timeshare plan to use the nonjudicial process for the foreclosure of an assessment lien. If the timeshare instrument prevents the use of the trustee foreclosure process, the timeshare interest may be amended.

The trustee foreclosure process for mortgage liens can only be used if the mortgage, or an amendment to a mortgage executed by the obligor before the effective date of the bill, contains a

notice that informs the owners of the timeshare interest that the mortgagee (the mortgage lender) has the right to elect the nonjudicial or the judicial foreclosure procedure, and that if the mortgagee elects the nonjudicial procedure, the owner (mortgagor) would have the option to object and proceed with a judicial foreclosure action.

The bill would take effect upon becoming law.

This bill substantially amends the following sections of the Florida Statutes: 721.07, 721.16, 721.20, 721.81, 721.82, 721.83, 721.85, and 721.86.

The bill creates sections 721.855 and 721.856, Florida Statutes.

II. Present Situation:

Timeshares - Chapter 721, F.S., provides for regulation of the offering, sale, management, and operation of real and personal property timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the accommodations and facilities are located within this state or offered within this state.¹ A timeshare plan developer must file a public offering statement and the required exhibits with the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation, prior to offering the timeshare plan to the public.²

A timeshare interest is a form of ownership of real property. The real property is typically a condominium unit or a cooperative unit. A timeshare property is typically a resort in which multiple parties hold the right to use the property. Each owner of a timeshare interest is allotted a period of time (typically one week) in which they may use the property.

Section 721.05(32), F.S., defines a “regulated short-term product” to mean:

a contractual right, offered by the seller, to use accommodations of a timeshare plan or other accommodations, provided that:

- (a) The agreement to purchase the short-term right to use is executed in this state on the same day that the prospective purchaser receives an offer to acquire an interest in a timeshare plan and does not execute a purchase contract, after attending a sales presentation; and
- (b) The acquisition of the right to use includes an agreement that all or a portion of the consideration paid by the prospective purchaser for the right to use will be applied to or credited against the price of a future purchase of a timeshare interest, or that the cost of a future purchase of a timeshare interest will be fixed or locked in at a specified price.

Section 721.11(6), F.S., sets forth the specific requirements for the sale of a regulated short-term product, and the agreement is regulated as advertising material under the section. A purchaser of

¹ Section 721.03, F.S.

² Section 721.07, F.S.

a regulated short-term product has the right to cancel the agreement until midnight of the 10th calendar day following the execution date of the agreement.

Section 721.05(34), F.S., defines a “timeshare estate” to mean:

a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof. The term shall also mean an interest in a condominium unit pursuant to s. 718.103, an interest in a cooperative unit pursuant to s. 719.103, or an interest in a trust that complies in all respects with the provisions of s. 721.08(2)(c)4., provided that the trust does not contain any personal property timeshare interests. A timeshare estate is a parcel of real property under the laws of this state.

Section 721.05(16), F.S., defines a timeshare “exchange program” to mean:

any method, arrangement, or procedure for the voluntary exchange of the right to use and occupy accommodations and facilities among purchasers. The term does not include the assignment of the right to use and occupy accommodations and facilities to purchasers pursuant to a particular multisite timeshare plan's reservation system. Any method, arrangement, or procedure that otherwise meets this definition, wherein the purchaser's total contractual financial obligation exceeds \$3,000 per any individual, recurring timeshare period, shall be regulated as a multisite timeshare plan in accordance with part II [of ch. 721, F.S.]

Timeshare exchange programs are regulated under s. 721.12, F.S.

Section 721.05(37), F.S., defines the term “timeshare license” to mean “a right to occupy a timeshare unit, which right is not a personal property timeshare interest or a timeshare estate.” According to representatives for the timeshare industry, the term “timeshare license” is a broad term and includes all non-ownership interests in a timeshare which do not have a real property fee interest in the timeshare estate, such as a membership agreement, a rental agreement, or an agreement to use an accommodation.

Section 721.05(39), F.S., defines a “timeshare plan” to mean:

any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, for consideration, receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years. The term “timeshare plan” includes:

(a) A “personal property timeshare plan,” which means a timeshare plan in which the accommodations are comprised of personal property that is not permanently affixed to real property; and

(b) A “real property timeshare plan,” which means a timeshare plan in which the accommodations of the timeshare plan are comprised of or permanently affixed to real property.

Section 721.52, F.S., defines a “multisite timeshare plan” to mean:

any method, arrangement, or procedure with respect to which a purchaser obtains, by any means, a recurring right to use and occupy accommodations or facilities of more than one component site, only through use of a reservation system, whether or not the purchaser is able to elect to cease participating in the plan. However, the term "multisite timeshare plan" shall not include any method, arrangement, or procedure wherein:

(a) The contractually specified maximum total financial obligation on the purchaser's part is \$3,000 or less, during the entire term of the plan; or

(b) The term is for a period of 3 years or less, regardless of the purchaser's contractually specified maximum total financial obligation, if any. For purposes of determining the term of such use and occupancy rights, the period of any optional renewals which a purchaser, in his or her sole discretion, may elect to exercise, whether or not for additional consideration, shall not be included. For purposes of determining the term of such use and occupancy rights, the period of any automatic renewals shall be included unless a purchaser has the right to terminate the membership at any time and receive a pro rata refund or the purchaser receives a notice no less than 30 days and no more than 60 days prior to the date of renewal informing the purchaser of the right to terminate at any time prior to the date of automatic renewal.

Multisite timeshare plan does not mean an exchange program as defined in s. 721.05. Timeshare estates may only be offered in a multisite timeshare plan pursuant to s. 721.57.

Multisite timeshare plans are regulated under part II of ch. 721, F.S.

Foreclosures – A foreclosure action is initiated when a borrower fails to make payments on his or her mortgage. Most mortgage lenders (mortgagees) wait until the borrower (mortgagor) has missed four payments before filing the complaint with the court. This practice is governed by what is known as a “deemer clause” in most mortgage contracts.³

A mortgage lender must serve a complaint,⁴ a notice of *lis pendens*,⁵ and a summons on the borrower in order to initiate foreclosure proceedings. After the foreclosure complaint is filed, the mortgagee (typically a bank or other mortgage lender) may request an order to show cause for the entry of final judgment of foreclosure. The court is required to immediately review the complaint and the court finds that the complaint is verified and alleges a cause of action to

³ See *Tenant's Rights in Foreclosure Actions*, Interim Report No. 2010-124, Florida Senate Committee on Judiciary, October 2009.

⁴ See s. 702.10, F.S.

⁵ The definition of “lis pendens,” as appropriate for this report, is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” BLACK’S LAW DICTIONARY (8th ed. 2004). Essentially, “[t]he purpose of a notice of lis pendens is to alert creditors, prospective purchasers and others to the fact that the title to a particular piece of real property is involved in litigation.” 35 Fla. Jur. 2d *Lis Pendens* s. 3 (2009).

foreclose on real property, the court must promptly issue an order directed to the defendant to show cause why a final judgment of foreclosure should not be entered.⁶

In an uncontested foreclosure proceeding in which the mortgagee waives the right to recoup any deficiency judgment, the court is required to enter final judgment within 90 days from the date of the close of pleadings.⁷ A mortgage foreclosure proceeding is uncontested if an answer not contesting the foreclosure has been filed or a default judgment has been entered by the court.⁸

The complaint generally alleges that the plaintiff, as the holder of the note and mortgage, seeks to foreclose the mortgage held on a particular piece of real property. The action is filed in the county where the real property is located.⁹ The complaint must be served on all parties to the action.¹⁰

The Legislature created an optional “speedy” foreclosure procedure for residential foreclosures in 1993, codified at s. 702.10, F.S. This section provides a fast-track foreclosure process through an order to show cause, whereby a lender can obtain an *in rem* judgment.¹¹ Upon filing a foreclosure complaint, the mortgagee can request an order to show cause for the entry of a final judgment. The judge must then read the complaint and verify that it states a cause of action.¹² If the complaint is verified, the judge will issue an order to the defendant to show cause why a final judgment should not be entered.¹³ If a defendant waives the right to be heard, the judge shall promptly enter a final judgment of foreclosure.¹⁴ Upon the court’s entry of a final judgment, the procedures set out in s. 45.031, F.S., for a judicial sale should be followed.

Statistics compiled by the Office of the State Courts Administrator show that foreclosure filings in Florida have grown at an exponential rate over the last three years.¹⁵ The office reports 238,080 filings from January through September 10, 2009 (excluding Dixie County). This number is more than triple the amount of filings reported for the entire year in 2006.¹⁶

Timeshare Foreclosures – Part III of ch. 721, F.S., provides for the foreclosure of liens on timeshare estates. Section 721.84, F.S., permits an obligor¹⁷ to appoint a registered agent for service of process under s. 721.85, F.S. Section 721.84, F.S., provides requirements for the assignment of the registered agent. The written statement of appointment must be signed by the obligor. According to representatives for the American Resort Development Association

⁶ Section 702.10, F.S.

⁷ Section 702.065(1), F.S.

⁸ *Id.*

⁹ Section 47.011, F.S.

¹⁰ *Dundee Naval Stores Co. v. McDowell*, 61 So. 108 (Fla. 1913).

¹¹ A “judgment in rem” is “[a] judgment that determines the status or condition of property and that operates directly on the property itself.” Black’s Law Dictionary (7th ed. 1999).

¹² Section 702.10(1), F.S.

¹³ *Id.*

¹⁴ Section 702.10(1)(d), F.S.

¹⁵ *Supra* at n. 3.

¹⁶ *Id.* at n. 14, provides: Summary Reporting System (SRS), *Real Property/Mortgage Foreclosure Filings by County and Month*, provided by the Office of the State Courts Administrator (on file with the Senate Committee on Judiciary).

¹⁷ Section 721.82(9), F.S., defines the term “obligor” to mean “the mortgagor, the person subject to an assessment lien, or the record owner of the timeshare estate.”

(ARDA), which represents timeshare developers, the lienholder in a timeshare interest foreclosure is usually the developer or the timeshare association.

Section 721.83(1), F.S., provides for the consolidation of foreclosure actions against timeshare estates. It permits that a complaint in a foreclosure proceeding involving timeshare estates to join in the same action multiple defendant obligors and junior interestholders of separate timeshare estates, provided that:

- The foreclosure proceeding involves a single timeshare property.
- The foreclosure proceeding is filed by a single plaintiff.
- The default and remedy provisions in the written instruments on which the foreclosure proceeding is based are substantially the same for each defendant.
- The nature of the defaults alleged is the same for each defendant.
- No more than 15 timeshare estates, without regard to the number of defendants, are joined within the same consolidated foreclosure action.

If a defendant in a consolidated foreclosure timely raises any defense or counterclaim, the court must sever for a separate trial the count of the complaint in which the defense or counterclaim is raised.¹⁸ A consolidated timeshare foreclosure action is considered a single action, suit, or proceeding for the purpose of payment of filing fees and service charges pursuant to general law. An additional filing fee of up to \$10 for each timeshare estate joined in that action must be paid to the clerk of court.¹⁹

Section 721.85, F.S., sets forth requirements for the service of process in timeshare foreclosures. Service of process for a foreclosure proceeding involving a timeshare estate may be made by:

- Any means recognized by law; or
- Substituted service on a registered agent under s. 721.84, F.S., at the registered agent's registered office.

The current owner and the mortgagor of a timeshare estate is required to promptly notify the owners' association and the mortgagee of any change of address.²⁰

Task Force on Residential Mortgage Foreclosure Cases - This tremendous increase in mortgage foreclosure filings caused and continues to cause a strain on the courts. A Task Force on Residential Mortgage Foreclosure Cases was formed in March 2009 to recommend to the Supreme Court "policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties."²¹ The Florida Supreme Court charged the task force with developing recommendations on alternative dispute resolution strategies, case management techniques, and approaches to providing pro bono or low-cost legal assistance to homeowners. The Court also directed the task force to examine existing

¹⁸ Section 721.83(2), F.S. Section 702.01, F.S., also requires the court to sever for separate trial all counterclaims against the foreclosing mortgagee.

¹⁹ Section 721.83(3), F.S.

²⁰ Section 721.85(3), F.S.

²¹ *Interim Report*, Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, May 8, 2009.

court rules and propose any changes to the rules that would “facilitate early, equitable resolution of residential mortgage foreclosure cases.”²² Although the focus of the task force was not on tenant issues directly, tenants may be affected by the recommendations of the task force to the extent the recommendations affect the resolution of foreclosure actions.

The recommendations were released on August 17, 2009. Noting the limited resources available, the task force recommended a uniform, statewide managed mediation program that is implemented through a model administrative order issued by the chief judge of each circuit. It will require that every foreclosure case that involves residential homestead property be referred to mediation unless the plaintiff and borrower agree otherwise or unless a pre-suit mediation was conducted. Some of the features of the administrative order include referral of the borrower to foreclosure counseling prior to mediation, early exchange of borrower and lender information, and the ability of the plaintiff’s representative to appear by telephone and borrowers will not be charged a fee.

The task force also recommended processing the foreclosure cases by three distinct categories:

- (1) homestead properties that are referred to mediation and are likely to resolve through the managed mediation program;
- (2) vacant and abandoned properties that can move through the courts quickly through expedited foreclosure processes;
- and (3) other foreclosure cases, which may include tenant-occupied or non-borrower-occupied properties, in which the borrower has been unable to communicate with the plaintiff to resolve the case, and which may be referred to the managed mediation program at equal cost to both parties.²³

The task force also recommended changes to the Rules of Civil Procedure along with the forms to use with the rules for those cases that will not be resolved through the mediation program.

III. Effect of Proposed Changes:

Nonjudicial Process for Foreclosure of Assessment Liens

The bill creates a nonjudicial foreclosure process for the foreclosure of assessment liens on timeshare interests.

Public Offering statement - The bill creates paragraph (jj) to subsection (5) of section 721.07, F.S., to provide a notice that must be included in every public offering statement for a timeshare plan that is not a multisite timeshare. The notice must be in conspicuous type. The notice advises the prospective purchaser of their rights and obligations with respect to payment of assessments, and the trustee procedure for the nonjudicial foreclosure of liens. The notice reads:

The managing entity has a lien against each timeshare interest to secure the payment of assessments, ad valorem assessments, tax assessments, and special assessments. Your failure to make any required payments may result in the

²² *Id.*

²³ *Final Report and Recommendations*, Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases, August 17, 2009.

judicial or trustee foreclosure of an assessment lien and the loss of your timeshare interest. If the managing entity initiates a trustee procedure, you shall have the option to object to the use of the trustee foreclosure procedure and the managing entity may only proceed by filing a judicial foreclosure action.

Assessment Liens - The bill amends s. 721.16(2), F.S., to provide that, as an alternative to initiating a judicial action for failure to pay assessments, the managing entity may initiate a trustee procedure to foreclose an assessment lien under s. 721.855, F.S. It also amends subsection (3) of s. 721.16, F.S., to revise a cross-reference to s. 718.116(5), F.S., relating to liens on condominium parcels to secure payment of assessments, and to conform terminology.

Part III of Chapter 721, F.S. – The bill renames part III of ch. 721 F.S., “Foreclosure of Liens on Timeshare Interests” from the current “Foreclosure of Liens on Timeshare Estates.”

Legislative Purpose – The bill amends s. 721.81, F.S., which relates to the legislative purpose of part III of ch. 721, F.S. The bill replaces the term “timeshare estates” to the term “timeshare interests.” It also uses the terms “judicial” and “trustee” when referencing foreclosures.

The bill creates subsection (5) of s. 721.81, F.S., to add the legislative finding that nearly all timeshare interest foreclosures are uncontested.

The bill creates subsection (6) of s. 721.81, F.S., to provide that it is the legislative intent to protect the ability of consumers who own timeshare interest to choose a judicial proceeding for the foreclosure of an assessment or mortgage lien on their timeshare interest.

The bill creates subsection (7) of s. 721.81, F.S., to provide that it is the legislative intent that the use of the trustee foreclosure must provide the same force and effect as the judicial foreclosure and that obligors shall not be subject to a deficiency judgment if the proceeds from the sale of the timeshare interest are insufficient to offset the amounts secured by a lien.

Definitions - The bill creates a new subsection (1) of s. 721.82, F.S., to define the term “amounts secured by the lien” to mean all past due amounts, accrued interest, late fees, taxes, advances for the payment of taxes, insurance and maintenance of the timeshare interest, and any fees or costs incurred by the lien holder or trustee, including any reasonable attorney’s fees, trustee’s fees and costs included in connection with the default.

It amends the definition of the term “assessment lien” in s. 721.82(2)(b), F.S., to reference liens unpaid ad valorem assessments and tax assessments instead of taxes.

The bill amends the definitions in s. 721.82, F.S., to replace the term “timeshare estate” with the term “timeshare interest” and uses the revised terminology throughout the bill.

The bill creates a new subsection (11) of s. 721.82, F.S., to define the term “permitted delivery service” to mean any nationally recognized common carrier delivery service or international airmail service that allows for signed return receipt service.

The bill creates a new subsection (14) of s. 721.82, F.S., to define the term “trustee” to mean:

- An attorney who is a member in good standing of the Florida Bar or his or her law firm;
- A title insurer authorized to transact business in this state under section 624.401, F.S., appointed as trustee or as substitute trustee in accordance with section 721.855, F.S., or 721.856, F.S.

The bill permits a receiver appointed under section 721.26, F.S., to act as a trustee. It also provides that a trustee must be independent as required by s. 721.05(20), F.S.

Consolidation of Judicial Foreclosure Actions – The bill amends s. 721.83, F.S., which relates to the consolidation of foreclosure actions, to replace the term “estate” with the term “interest” when referencing timeshares, and adds that it applies to judicial foreclosures.

Service of Notice – The bill amends s. 721.85(1)(a), F.S., which relates to the service of process in timeshare foreclosure proceedings, to provide that service may be made by certified mail, registered mail, or a permitted delivery service, return receipt requested.

The bill also creates subsection (3) of s. 721.85, F.S., to provide that substituted notice under ss. 721.855, F.S., or 721.856, F.S., may be made on any party who has been appointed a registered agent under s. 721.84 F.S., at the registered office.

The bill also amends s. 721.85, F.S., to replace the term “estate” with the term “interest” when referencing timeshares.

Procedure for the Trustee Foreclosure of Assessment Liens

The bill creates s. 721.855, F.S., to provide a process for the nonjudicial foreclosure of assessment liens by use of a trustee foreclosure procedure.

Appointment of Trustees - Subsection (1) of s. 721.855, F.S., provides for the appointment of trustees. A lienholder may appoint a trustee by recording a notice of appointment in the public records of the county or counties in which the timeshare interest is located. A lienholder may appoint multiple trustees in a single appointment, and any appointed trustee may be used by a lienholder in the nonjudicial foreclosure process. The appointment must contain the name and address of the trustee, substitute trustee, lienholder, and of the timeshare plan. A list of the appointed trustees and substitute trustees must be maintained by the lienholder and provided to the obligor within three days of a written request from the obligor.

Initiation of a Trustee Foreclosure - Subsection (2) of s. 721.855, F.S., provides for the initiation of a nonjudicial foreclosure procedure. Before the nonjudicial foreclosure proceeding is initiated:

- The managing entity must, by written notice, inform the owners of the timeshare interests that the managing entity has the right to elect the nonjudicial foreclosure process;
- A claim of lien against the timeshare interest must be recorded; and
- The lienholder must deliver an affidavit to the trustee that identifies the obligor, where the lien is recorded, the date the notice of intent to file a lien was given, the amounts secured by the lien, and other specified information.

The written notice specified in s. 721.855(2)(a), F.S., may be provided by mailing the notice to each owner's notice address, in the notice of an annual or special meeting of the owners, by posting the notice on the website of the applicable timeshare plan, or by any owner communication used by the managing entity. The notice for the trustee foreclosure of an assessment lien does not need to be included in the timeshare instrument or in the mortgage for the timeshare interest.²⁴

Obligor's Rights - Subsection (3) of s. 721.855, F.S., provides the obligor's right to object to the use of the nonjudicial foreclosure procedure. The objection may be made at any time before the sale of the timeshare interest. The objection must be in writing and delivered to the trustee. If an objection is received, the trustee may not proceed with the nonjudicial foreclosure proceeding.

At any time before the trustee issues the certificate of sale, the obligor may cure the default and redeem the timeshare interest by paying to the trustee the amounts secured by the lien in cash or in certified funds. The obligor does not have a right of redemption after the trustee issues a certificate of sale.

Conditions of the Trustee's Power to Sell - Subsection (4) of s. 721.855, F.S., provides the conditions to the trustee's power to sell a timeshare interest that has been foreclosed through the nonjudicial process. The trustee may only sell the timeshare interest if:

- The trustee has received the lienholders affidavit required under paragraph s. 721.855(2)(c), F.S.;
- No written objection to the nonjudicial foreclosure procedure has been received by the trustee and the timeshare interest has not been redeemed;
- There is no lis pendens recorded and pending and no injunctive action has been filed;
- The trustee has provided written notice of default and intent to sell as required by s. 721.855(5), F.S.; and at least 30 calendar days having elapsed after such notice is deemed perfected; and
- The notice of sale required by s. 721.855(6), F.S., has been recorded in the public records of the county or counties in which the timeshare interest is located.

Notice of Default and Intent to Foreclose - Subsection (5) of s. 721.855, F.S., provides for a notice of default and intent to sell. In the nonjudicial foreclosure proceeding, the trustee is required to send the obligor a written notice of default and intent to sell to the notice address of the obligor. The notice must be sent certified mail, registered mail, or by a permitted delivery service,²⁵ return receipt requested. It must be mailed or sent by first class mail or permitted delivery service, postage paid. Unless otherwise specified in this analysis, all of the required mailings in the bill are required to be made by return receipt requested.

The notice must include the required identifying information and a form to object to the trustee foreclosure, including the period of time after the date of the notice of default and intent to foreclose within which the obligor may cure the default.

²⁴ See s. 721.855(13), F.S.

²⁵ The bill creates s. 721.82(11), F.S., to define "permitted delivery service."

The Notice of Default and Intent to Foreclose must include a form notice that notifies the obligor that he or she risks losing their timeshare interest in the nonjudicial foreclosure proceeding. It also advises the obligor that, if he or she does not object to the use of the trustee foreclosure procedure, he or she will not be subject to a deficiency judgment even if the proceeds from the sale of your timeshare interest are insufficient to offset the amounts secured by the lien.

It must also include an objection form that permits the obligor to object to the trustee foreclosure proceeding.

The Notice of Default and Intent to Sell, without the objection form, must also be mailed to any junior interest holder.

Section 721.855(5)(a)5., F.S., provides that notice is deemed perfected when the trustee receives the return receipt bearing the signature of the obligor or junior interestholder. The notice is not deemed perfected if a signed return receipt is received within 30 calendar days after the notice is mailed and the trustee cannot ascertain that the obligor or junior interestholder is the person who signed the return receipt, the trustee cannot ascertain who signed the receipt, or the notice is returned or refused within 30 days after the notice is mailed.

Section 721.855(5)(b), F.S., provides that, if the notice is returned as undeliverable the trustee must perform a diligent search and inquiry to obtain a different address for the obligor or junior interestholder, the trustee must mail a second notice to the new address or addresses.

Section 721.0855(5)(c), F.S., requires that, if the notice is not perfected, the trustee may perfect notice against the obligor by publication in a newspaper of general circulation in the county or counties in which the timeshare interest is located. The notice must appear at least once a week for 2 consecutive weeks, and it may be grouped with an unlimited number of notices in the same publication, provided that all of the notices pertain to the same timeshare plan. The publication notice is considered perfected when it is published.

Paragraphs (d), (e), (f), and (g) of s. 721.855(5), F.S., require the trustee to execute an affidavit regarding the manner in which the notice was perfected. After the notice is perfected, the trustee is required to execute an affidavit in recordable form and attach the affidavit to the certificate of compliance required under s. 721.855(7), F.S. The affidavit must set forth the manner in which the notice was perfected, the nature of the notice, the date the notice was mailed, the manner in which the notice was mailed, and the basis for that knowledge. The signed return receipt from the certified or registered mail or delivery service must be attached to the affidavit.

If the notice was made by publication, the affidavit must also state that the notice was perfected by publication after a diligent search and inquiry. If available, the return envelope from the failed attempt to mail the notice of publication must be attached to the affidavit. No other action is necessary to perfect notice.

Notice of sale - Section 721.855(6), F.S., relates to the notice of sale. Section 721.855(6)(a), F.S., sets forth the basic information that the notice of sale must contain about the timeshare interest, including the amounts secured by the lien and a per diem amount to account for further accrual of the amounts secured by the lien. It also includes a notice of right of the obligor or any

junior interestholder to cure the default or redeem its interest up to the date the trustee issues the certificate of sale in accordance with s. 721.855(8)(f), F.S., and the method by which the cure or redemption may be made.

Section 721.855(6)(b), F.S., requires the trustee to mail a copy of the notice of sale within 3 days from the date it is submitted for recording, by first class mail, postage prepaid, or permitted delivery service, to the notice addresses of the obligor and any junior interestholder. After the recording of the notice of sale, no other notice is required to be given to any person claiming an interest in the timeshare interest.

The recording of the notice of sale has the same force and effect as the filing of a lis pendens in a judicial proceeding under s. 48.23, F.S. The notice of sale must be published in a newspaper of general circulation for two consecutive weeks. The first publication must be 5 days before the sale.

Manner of Sale – Section 721.855(7), F.S., provides requirements for the sale of the timeshare interest in a public auction, which must be held in the county in which the timeshare interest is located. The sale must occur within 30 days of the recording of the notice of sale and between the hours of 9:00 a.m. and 4:00 p.m. The sale may occur through the Internet at a specific website.

The trustee must conduct the sale and act as the auctioneer. It is not clear whether the trustee must be licensed under part VI of ch. 468, F.S., as an auctioneer. However, s. 468.383, provides exemptions from the auctioneer act for auctions conducted by the owner, or the owner's attorney, of any part of the property being offered, unless the owner acquired the goods to resell,²⁶ the auctions are conducted under a judicial or an administrative order, or the sale is required by law to be at auction,²⁷ or the auctions are conducted by a trustee pursuant to a power of sale contained in a deed of trust on real property.²⁸ These exemptions may qualify the trustee to serve as an auctioneer.

The lienholder may bid at the sale. Written instructions must be sent by the lienholder to the trustee for the announcement of the sale. The highest bidder must pay the trustee the bid price in cash or certified funds on the day of the sale. On the day of the sale and after receipt of the sale funds from the highest bidder, the trustee must mail a copy of the certificate of sale to the obligor and any junior interestholders.

Before the sale is conducted, a junior interestholder with a dispute regarding any matter may pursue adjudication by a court, by an interpleader action, or otherwise.

Effect of the Trustee's Sale – Section 721.855(8), F.S., provides that a sale under s. 721.855(8), F.S., forecloses and terminates all interests of the obligor, any junior interestholders, and any other person claiming by, through, or under any such person, in the affected timeshare interest. It

²⁶ Section 468.383(1), F.S.

²⁷ Section 468.383(2), F.S.

²⁸ Section 468.383(5), F.S.

provides that an assessment lien does not merge into the trustee's deed to any extent that a subsequent judicial foreclosure or reforeclosure of the assessment lien is necessary or required. The validity of the sale as to the interests of any person properly notified is not affected due to a failure to give notice to any person entitled to notice. If a person who is entitled to notice was not given notice, the person has the rights of a person not made a defendant in a judicial foreclosure. In a judicial foreclosure proceeding, a person who has not been provided notice has the right to file an action to be included in the proceeding. According to a representative for ARDA, this would typically be a junior interestholder and is extremely rare because the lienholder is typically only the association and/or the developer.

Section 721.855(8)(b), F.S., provides that all rights of redemption that have been foreclosed under this section terminate when the certificate of sale is issued.

Section 721.855(8)(c), F.S., provides that the sale releases the obligor's liability for all amounts secured by the lien. After the sale of the obligor's timeshare interest, the lienholder has no right to any deficiency judgment against the obligor.

Section 721.855(8)(d), F.S., provides that third parties without actual knowledge of irregularities in the sale may rely upon the validity of the issuance and recording of the trustee's deed. It provides that, if there is an irregularity in the foreclosure proceedings, a purchaser assumes the rights of the lienholder, i.e., becomes subrogated to all the rights of the lienholder, to the extent necessary to foreclose the assessment lien in order to correct the irregularity. The purchaser may file a new foreclosure action to foreclose on the assessment lien. Any subsequent foreclosure that is required to correct an irregularity may be conducted under s. 721.855, F.S.

Trustee's Certificate of Compliance – Section 721.855(9), F.S., sets forth the trustee's certificate of compliance, which the trustee must execute within 10 days of the sale of the timeshare interest. The certificate of compliance evidences compliance with the requirements in s. 721.855, F.S., relating to the delivery of the notice of default and intent to sell, the trustee's affidavit, and the notice requirements. It also includes a statement that the default was not cured, the timeshare interest was not redeemed, and the trustee did not receive any written objection to the trustee foreclosure proceeding. The trustee is entitled to rely upon an affidavit or certification from the lienholder for the facts and circumstances of default and failure to cure the default.

Trustee's Deed – Section 721.855(10), F.S., sets forth the requirements for the trustee's deed, which conveys to the highest bidder all of the rights, title, and interest in the timeshare interest that the former owner had, or had the power to convey. The trustee's deed does not contain any warranties of title from the trustee. The trustee is required to issue the trustee's deed within 10 calendar days of the sale if no injunctive action has been served on the trustee. The trustee's deed must be recorded and the trustee's certificate of compliance must be attached as an exhibit to the trustee's deed.

Section 721.855(10)(c)1., F.S., provides that the certificate of compliance and trustee's deed together are presumptive evidence of the truth of the matters set forth in them. The sale may not be set aside or voided against any person acquiring the timeshare interest, including any subsequent mortgagee or buyer.

The issuance and recording of the trustee's deed has the same force and effect as the issuance and recording of a certificate of title by the clerk of the court in a judicial foreclosure action.

Disposition of Proceeds of Sale – Section 721.855(11), F.S., specified how the proceeds from the sale of the timeshare interest must be applied by the trustee, including to cover the expenses of the sale, and to pay any assessment amounts secured by the lien. The trustee may file an action in interpleader to determine the proper distribution of surplus to competing junior interestholders. If there are no junior interestholders, any surplus after the sale must go to the former owner of the timeshare interest. If the trustee is not able to locate the former owner one year after the sale, any surplus must be deposited with the Chief Financial Officer pursuant to ch. 717, F.S.²⁹

Judicial Foreclosure Actions – Section 721.855(12), F.S., clarifies that the lienholder may proceed with a judicial foreclosure action in lieu of the trustee procedures established in this section.

Application – Section 721.855(13), F.S., provides that the trustee foreclosure procedure applies to any default that gives rise to an assessment lien after the effective date of this section. However, a timeshare instrument does not need to be amended to permit a managing entity to use the trustee process for the foreclosure of an assessment lien. If the timeshare instrument prevents the use of the trustee process, the timeshare interest may be amended by a majority of those present and voting at a duly called meeting of the owners' association at which at least 15 percent of the voting interests are present in person or by proxy.

Actions For Failure to Follow the Trustee Foreclosure Procedure – Section 721.855(14), F.S., provides that an obligor may bring an action against the lienholder for actual damages for a material violation of this section.

Trustee Foreclosure of Mortgage Liens

The bill creates s. 721.856, F.S., to provide procedures for trustee foreclosures of mortgage liens. The procedures are substantially similar to the procedures for the nonjudicial, trustee foreclosure of assessment liens in s. 721.855, F.S., except that the trustee process is limited to a prospective application. It can only be used if the mortgage, or an amendment to a mortgage, executed by the obligor before the effective date of s. 721.856, F.S., contains a statement in substantially the same form provided in s. 721.856(2)(a), F.S.

The required written notice in the mortgage or in an amendment to the mortgage informs the owners of the timeshare interests that the mortgagee has the right to elect the nonjudicial foreclosure procedure or the judicial procedure, and that if the mortgagee elects the nonjudicial procedure, the owner (mortgagor) would have the option to object and proceed by filing a judicial foreclosure action.

²⁹ Chapter 717, F.S., relates to the disposition of unclaimed property by the Chief Financial Officer.

In effect, the trustee foreclosure process permits the mortgagee to expedite the foreclosure process because the mortgagee would not have to serve a complaint for foreclosure and a summons on the borrower in order to initiate the foreclosure proceedings.

Conflict of Laws

The bill amends s. 721.86, F.S., to provide that the provisions of part III of ch. 721, F.S., shall prevail in the event of a conflict between this part and the other provisions of chs. 721 and 702, F.S.,³⁰ or other applicable law.

The bill also amends subsection (4) of s. 721.86, F.S., to exempt assessment liens as provided in s. 721.855(13), F.S., which provides for the provisions of part III of s. 721, F.S., apply to assessment liens and mortgage liens arising after the effective date of this part and to all assessment liens and mortgage liens that exist prior for which a foreclosure proceeding has not yet commenced.

Managing Entities

The bill amends s. 721.20(2), F.S., to provide that a real estate broker, sales associate, or appraiser's license under ch. 475, F.S., is not required for persons who solicit prospective purchasers of a timeshare plan and any purchaser who refers no more than 20 people to a managing entity per year or who otherwise provides testimonials on behalf of a managing entity. Current law limits the real estate license exemption to referrals to a developer and testimonials on behalf of a developer.

Effective Date

The bill would take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁰ Chapter 702, F.S., relates to the foreclosure of mortgages, agreements for deeds, and statutory liens.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill would permit the managing entities of timeshare owners' associations and mortgagees to simplify and expedite the foreclosure process for assessment liens and mortgage liens through a judicial or nonjudicial proceeding. Managing entities and mortgagees who use the more expedited nonjudicial process may experience reduced legal and administrative costs relative to the judicial process.

C. Government Sector Impact:

The revenue estimating conference has not met to ascertain if there is any fiscal impact on the judicial system due to the diversion of foreclosure of timeshare interest cases to the nonjudicial process provided by the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 24, 2010:

The committee substitute (CS) replaces all references to the term “nonjudicial” with the term “trustee,” e.g., “trustee procedure” and “trustee foreclosure” instead of “nonjudicial procedure” and “nonjudicial foreclosure.” It also replaces all references to “public records” with “official records.”

The CS amends the notice in s. 721.07(5)(jj), F.S., to reference “ad valorem assessments” and “tax assessments” instead of “ad valorem taxes.”

The CS amends subsection (3) of s. 721.16, F.S., to correct a cross-reference and conform terminology.

The CS amends s. 721.82(2)(b), F.S., relating to the definition of the term “assessment lien” to reference liens, unpaid ad valorem assessments, and tax assessments instead of taxes.

The CS modifies the definition of the term “permitted delivery service” in s. 721.82(11), F.S., to provide that the service “allows for signed return receipt service” instead of the service “requiring a signed return receipt.” It amends s. 721.85(1)(a), F.S., to reference “certified mail or registered mail” instead of “certified and registered mail, return receipt requested.” It requires that the first class mail or permitted delivery service must be with postage prepaid.

Trustee Procedure for Assessment Liens - Regarding the trustee procedure for the foreclosure of assessment liens, the CS:

- Amends s. 721.855(2)(b)1., F.S., to provide that the effective date of the title search, not the title search, must be within 60 calendar days before the date of the affidavit;
- Section 721.855(3)(b), F.S., does not provide that, if the obligor delivers the written objection more than 30 calendar days after the notice of default and intent to sell is deemed perfected under subsection (5) of s. 721.855, F.S., the lienholder has the right to collect from the obligor in a judicial foreclosure procedure all of the costs incurred in the nonjudicial foreclosure procedure. It provides that, before the trustee issues the certificate of sale, the obligor may cure the default and redeem the timeshare interest by paying to the trustee the amounts secured by the lien in cash or in certified funds. It also provides that the obligor does not have a right of redemption after the trustee issues the certificate of sale;
- Amends subsection (4) of s. 721.855, F.S., to include, as a condition to the trustee’s power of sale, that the timeshare interest has not been redeemed;
- Amends subsection (5) of s. 721.855, F.S., to rename the Notice of Default and Intent to Sell to the Notice of Default and Intent to Foreclose;
- Amends s. 721.855(5)(a), F.S., to reference “certified mail or registered mail” instead of “certified and registered mail, return receipt requested.” It requires that the first class mail or permitted delivery service must be with postage prepaid;
- Amends s. 721.855(5)(a)1., F.S., to require that the Notice of Default and Intent to Foreclose must state the period of time after the date of the Notice of Default and Intent to Foreclose within which the obligor may cure the default;
- Amends the notice in s. 721.855(5)(a)3., F.S., to provide that, if the obligor does not object to the use of the trustee foreclosure procedure, he or she will not be subject to a deficiency judgment even if the proceeds from the sale of the timeshare interest are insufficient to offset the amounts secured by the lien. It deletes the notice that an objection may subject the obligor to a deficiency judgment;
- Amends subparagraph (a)5. and paragraphs (b) and (c) of s. 721.855(5), F.S., to provide that, if the notice is returned as undeliverable, the trustee must perform a diligent search and inquiry to obtain a different address for the obligor or junior interestholder, and the trustee must mail a second notice to the new address or addresses. It does not require the mailing of a second Notice of Default and Intent to Foreclose, if the notice is received within 30 days after it is mailed and the trustee cannot identify the signature. It provides for an affidavit to the certificate of compliance for a notice perfected under s. 721.855(5)(b)1., F.S., relating to the trustee’s diligent search and inquiry to obtain a different address for the obligor or

- junior interestholder. It deletes the requirement that the signed return receipt must be attached to the certificate of compliance;
- Amends s. 721.855(6)(b), F.S., to require that the trustee mail a copy of the notice of sale within 3 days from the date it is submitted for recording instead of on the date it is submitted for recording. It also provides for the use of a permitted delivery service for mailing the notice of sale;
 - Moves the requirements for the trustee's certificate of compliance from subsection (7) to subsection (9) of s. 721.855, F.S., and renumbers the subsequent subsections;
 - Creates paragraph (g) of s. 721.855(7), F.S., to provide that, before the sale is conducted, a junior interestholder with a dispute regarding any matter may pursue adjudication by a court, by interpleader action, or otherwise;
 - Does not provide in s. 721.855(8), F.S., relating to the effect of the trustee's sale, that a lienholder may correct the failure to meet the requirements of s. 721.855, F.S., through a subsequent foreclosure of a timeshare interest;
 - Deletes the provision that the sale extinguishes the assessment lien in s. 721.855(8)(c), F.S.;
 - Amends s. 721.855(8)(d), F.S., to provide that a purchaser has the right to become subrogated to all the rights of the lienholder in order to correct irregularities in the foreclosure by subsequent reforeclosure;
 - Amends s. 721.855(9), F.S., relating to the trustee's certificate of compliance, to require the trustee to execute the certificate within 10 days of the sale of the timeshare interest instead of within 3 days. It also deletes the requirement that the certificate of compliance must be recorded in the public records of the county in which the timeshare interest is located; and
 - Amends s. 721.855(10), F.S., to require that the trustee's certificate of compliance must be attached to the trustee's deed.

Trustee Procedure for Mortgage Liens - Regarding the trustee procedure for the foreclosure of mortgage liens in s. 721.856, F.S., the CS:

- Amends s. 721.856(2)(b)1., F.S., to provide that the effective date of the title search, not the title search, must be within 60 calendar days before the date of the affidavit.
- Section 721.856(3)(b), F.S., does not provide that , if the obligor delivers the written objection more than 30 calendar days after the notice of default and intent to sell is deemed perfected under subsection (5) of s. 721.856, F.S., the lienholder has the right to collect from the obligor in a judicial foreclosure procedure all of the costs incurred in the nonjudicial foreclosure procedure. It provides that, before the trustee issues the certificate of sale, the obligor may cure the default and redeem the timeshare interest by paying to the trustee the amounts secured by the lien in cash or in certified funds. It also provides that the obligor does not have a right of redemption after the trustee issues the certificate of sale.
- Amends subsection (4) of s. 721.856, F.S., to include, as a condition to the trustee's power of sale, that the timeshare interest has not been redeemed.
- Amends subsection (5) of s. 721.856, F.S., to rename the Notice of Default and Intent to Sell to the Notice of Default and Intent to Foreclose.

- Amends s. 721.856(5)(a), F.S., to reference “certified mail or registered mail” instead of “certified and registered mail, return receipt requested.” It requires that the first class mail or permitted delivery service must be with postage prepaid.
- Amends s. 721.856(5)(a)1., F.S., to require that the Notice of Default and Intent to Foreclose must state the period of time after the date of the Notice of Default and Intent to Foreclose within which the obligor may cure the default.
- Amends the notice in s. 721.856(5)(a)3., F.S., to provide that, if the obligor does not object to the use of the trustee foreclosure procedure, he or she will not be subject to a deficiency judgment even if the proceeds from the sale of the timeshare interest are insufficient to offset the amounts secured by the lien. It deletes the notice that an objection may subject the obligor to a deficiency judgment.
- Amends subparagraph (a)5. and paragraphs (b) and (c) of s. 721.856(5), F.S., to provide that, if the notice is returned as undeliverable, the trustee must perform a diligent search and inquiry to obtain a different address for the obligor or junior interestholder, and the trustee must mail a second notice to the new address or addresses. It does not require the mailing of a second notice of default and intent to foreclose, if the notice is received within 30 days after it is mailed and the trustee cannot identify the signature. It provides for an affidavit to the certificate of compliance for a notice perfected under s. 721.856(5)(b)1., F.S., relating to the trustee’s diligent search and inquiry to obtain a different address for the obligor or junior interestholder. It deletes the requirement that the signed return receipt must be attached to the certificate of compliance.
- Amends s. 721.856(6)(b), F.S., to require the trustee to mail a copy of the notice of sale within 3 days from the date it is submitted for recording instead of on the date it is submitted for recording. It also provides for the use of a permitted delivery service for mailing the notice of sale.
- Moves the requirements for the trustee’s certificate of compliance from subsection (7) to subsection (9) of s. 721.856, F.S., and renumbers the subsequent subsections.
- Creates paragraph (g) of s. 721.856(7), F.S., to provide that, before the sale is conducted, a junior interestholder with a dispute regarding any matter may pursue adjudication by a court, by interpleader action, or otherwise.
- Does not provide in s. 721.856(8), F.S., relating to the effect of the trustee’s sale, that a lienholder may correct the failure to meet the requirements of s. 721.856, F.S., through a subsequent foreclosure of a timeshare interest.
- Deletes the provision that the sale extinguishes the mortgage lien in s. 721.856(8)(c), F.S.
- Amends s. 721.856(8)(d), F.S., to provide that a purchaser has the right to become subrogated to all the rights of the lienholder in order to correct irregularities in the foreclosure by subsequent reforeclosure.
- Amends s. 721.856(9), F.S., relating to the trustee’s certificate of compliance, to require the trustee to execute the certificate within 10 days of the sale of the timeshare interest instead of within 3 days. It also deletes the requirement that the certificate of compliance must be recorded in the public records of the county in which the timeshare interest is located.
- Amends s. 721.856(10), F.S., to require that the trustee’s certificate of compliance must be attached to the trustee’s deed.

Miscellaneous Provisions - The CS does not amend s. 721.86(1), F.S., to delete the current provision that the procedures in part III of ch. 721, F.S., must be given effect in the context of any foreclosure proceedings against timeshare estates governed by chs. 702, 718, 719, or 721, F.S.

The CS amends subsection (4) of s. 721.86, F.S., to exempt assessment liens as provided in s. 721.855(13), F.S.

The CS amends subsection (2) of s. 721.20, F.S., to apply the real estate license exemption to include referrals to a managing entity and testimonials on behalf of a managing entity.

B. Amendments:

None.